PROPOSED AMENDMENTS TO THE MASSACHUSSETTS RULES OF CIVIL PROCEDURE REGARDING DISCOVERY OF ELECTRONICALLY STORED INFORMATION

RULE 16. PRE-TRIAL PROCEDURE: FORMULATING ISSUES

In any action, the court may in its discretion direct the attorneys for the parties to appear before it for a conference to consider:

(1) The simplification of the issues:

(2) The necessity or desirability of amendments to the pleadings;

(3) The possibility of obtaining admissions of fact and of documents which will avoid unnecessary proof;

(4) The limitation of the number of expert witnesses;

(5) The timing and extent of discovery;

(6) The preservation and discovery of electronically stored information;

(7) Agreements or proceedings for asserting claims of privilege or of protection as trial preparation material after information is produced;

(8) The advisability of a preliminary reference of issues to a master;

(9) The possibility of settlement;

(10) Agreement as to damages; and

(11) Such other matters as may aid in the disposition of the action.

The court shall make an order which recites the action taken at the conference, the amendments allowed to the pleadings, and the agreements made by the parties as to any of the matters considered, and which limits the issues for trial to those not disposed of by admissions or agreements of counsel; and such order when entered controls the subsequent course of the action, unless modified at the trial to prevent manifest injustice.

RULE 26. GENERAL PROVISIONS GOVERNING DISCOVERY

(a) Discovery Methods. Parties may obtain discovery by one or more of the following methods except as otherwise provided in Rule 30(a) and Rule 30A(a), (b): depositions upon oral examination or written questions; written interrogatories; production of documents or things or permission to enter upon land or other property, for inspection and other purposes; physical and mental examinations; and requests for admission. Unless the court orders otherwise, or unless otherwise provided in these rules, the frequency of use of these methods is not limited.

(b) Scope of Discovery. Unless otherwise limited by order of the court in accordance with these rules, the scope of discovery is as follows:

(1) *In General.* Parties may obtain discovery regarding any matter, not privileged, which is relevant to the subject matter involved in the pending action, whether it relates to the claim or defense of the party seeking discovery or to the claim or defense of any other party, including the existence, description, nature, custody, condition and location of any books, documents, or other tangible things and the identity and location of persons having knowledge of any discoverable matter. It is not ground for objection that the information sought will be inadmissible at the trial if the information sought appears reasonably calculated to lead to the discovery of admissible evidence.

(2) *Insurance Agreements.* A party may obtain discovery of the existence and contents of any insurance agreement under which any person carrying on an insurance business may be liable to satisfy part or all of a judgment which may be entered in the action or to indemnify or reimburse for payments made to satisfy the judgment. Information concerning the insurance agreement is not by reason of disclosure admissible in evidence at trial. For purposes of this paragraph, an application for insurance shall not be treated as part of an insurance agreement.

(3) *Trial Preparation: Materials.* Subject to the provisions of subdivision (b)(4) of this rule, a party may obtain discovery of documents and tangible things otherwise discoverable under subdivision (b)(1) of this rule and prepared in anticipation of litigation or for trial by or for another party or by or for that other party's representative (including his attorney, consultant, surety, indemnitor, insurer, or agent) only upon a showing that the party seeking discovery has substantial need of the materials in the preparation of his case and that he is unable without undue hardship to obtain the substantial equivalent of the materials by other means. In ordering discovery of such materials when the required showing has been made, the court shall protect against disclosure of the mental impressions, conclusions, opinions, or legal theories of an attorney or other representative of a party concerning the litigation.

A party may obtain without the required showing a statement concerning the action or its subject matter previously made by that party. Upon request, a person not a party may obtain without the required showing a statement concerning the action or its subject matter previously made by that person. If the request is refused, the person may move for a court order. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion. For purposes of this paragraph, a statement previously made is (A) a written statement signed or otherwise adopted or approved by the person making it, or (B) a stenographic, mechanical,

electrical, or other recording, or a transcription thereof, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

(4) *Trial Preparation: Experts.* Discovery of facts known and opinions held by experts, otherwise discoverable under the provisions of subdivision (b)(1) of this rule and acquired or developed in anticipation of litigation or for trial, may be obtained only as follows:

(A) (i) A party may through interrogatories require any other party to identify each person whom the other party expects to call as an expert witness at trial, to state the subject matter on which the expert is expected to testify, and to state the substance of the facts and opinions to which the expert is expected to testify and a summary of the grounds for each opinion. (ii) Upon motion, the court may order further discovery by other means, subject to such restrictions as to scope and such provisions, pursuant to subdivision (b)(4)(C) of this rule, concerning fees and expenses as the court may deem appropriate.

(B) A party may discover facts known or opinions held by an expert who has been retained or specially employed by another party in anticipation of litigation or preparation for trial and who is not expected to be called as a witness at trial, only as provided in Rule 35(b) or upon a showing of exceptional circumstances under which it is impracticable for the party seeking discovery to obtain facts or opinions on the same subject by other means.

(C) Unless manifest injustice would result, (i) the court shall require that the party seeking discovery pay the expert a reasonable fee for time spent in responding to discovery under subdivisions (b)(4)(A)(ii) and (b)(4)(B) of this rule; and (ii) with respect to discovery obtained under subdivision (b)(4)(A)(ii) of this rule the court may require, and with respect to discovery obtained under subdivision (b)(4)(B) of this rule the court shall require, the party seeking discovery to pay the other party a fair portion of the fees and expenses reasonably incurred by the latter party in obtaining facts and opinions from the expert.

(5) *Claims of Privilege or Protection of Trial Preparation Materials.*

(A) *Privilege Log.* When a party withholds information otherwise discoverable under these rules by claiming that it is privileged or subject to protection as material in anticipation of litigation or for trial, the party shall make the claim expressly and, without revealing information that is privileged or protected, shall prepare a privilege log containing the following information: the respective author(s) and sender(s) if different; the recipient(s); the date and type of document, written communication or thing not produced; and in general terms, the subject matter of the withheld information. By written agreement of the party seeking the withheld information and the party holding the information or by court order, a privilege log need not be prepared or may be limited to certain documents, written communications, or things.

(B) *Information mistakenly produced; claim of privilege.* If information produced in discovery is subject to a claim of privilege or of protection as trial-preparation material, the party making the claim may notify any party that received the information of the claim and the basis for it. After being notified, a party shall promptly return, sequester, or destroy the

specified information and any copies it has; shall not use or disclose the information until the claim is resolved; shall take reasonable steps to retrieve the information if the party disclosed it before being notified; and may promptly present the information to the court under Trial Court Rule VIII, Uniform Rules on Impoundment Procedure, for a determination of the claim. The producing party shall preserve the information until the claim is resolved.

In resolving any such claim, the court should determine whether:

(i) the disclosure was inadvertent;

(ii) the holder of the privilege or protection took reasonable steps to prevent disclosure; and

(iii) the holder promptly took reasonable steps to rectify the error

(C) *Effect of a ruling.* If the court, following such procedure, or pursuant to an order under Rule 26(f)(3), upholds the privilege or protection in a written order, the disclosure shall not be deemed a waiver in the matter before the court or in any other proceeding.

(c) Protective Orders. Upon motion by a party or by the person from whom discovery is sought, and for good cause shown, the court in which the action is pending or alternatively, on matters relating to a deposition, the court in the county or judicial district, as the case may be, where the deposition is to be taken may make any order which justice requires to protect a party or person from annoyance, embarrassment, oppression, or undue burden or expense, including one or more of the following: (1) that the discovery not be had; (2) that the discovery may be had only on specified terms and conditions, including a designation of the time or place; (3) that the discovery may be had only by a method of discovery other than that selected by the party seeking discovery; (4) that certain matters not be inquired into, or that the scope of the discovery be limited to certain matters; (5) that discovery be conducted with no one present except persons designated by the court; (6) that a deposition after being sealed by opened only by order of the court; (7) that a trade secret or other confidential research, development, or commercial information not be disclosed or be disclosed only in a designated way; (8) that the parties simultaneously file specified documents or information enclosed in sealed envelopes to be opened as directed by the court.

If the motion for a protective order is denied in whole or in part, the court may, on such terms and conditions as are just, order that any party or person provide or permit discovery. The provisions of Rule 37(a)(4) apply to the award of expenses incurred in relation to the motion.

(d) Sequence and Timing of Discovery. Unless the court upon motion, for the convenience of parties and witnesses and in the interests of justice, orders otherwise, methods of discovery may be used in any sequence and the fact that a party is conducting discovery, whether by deposition or otherwise, shall not operate to delay any other party's discovery.

(e) Supplementation of Responses. A party who has responded to a request for discovery with a response that was complete when made is under no duty to supplement his response to include information thereafter acquired, except as follows:

(1) A party is under a duty seasonably to supplement his response with respect to any question directly addressed to (A) the identity and location of persons having knowledge of discoverable matters, and (B) the identity of each person expected to be called as an expert witness at trial, the subject matter on which he is expected to testify, and the substance of his testimony.

(2) A party is under a duty seasonably to amend a prior response if he obtains information upon the basis of which (A) he knows that the response was incorrect when made, or (B) he knows that the response though correct when made is no longer true and the circumstances are such that a failure to amend the response is in substance a knowing concealment.

(3) A duty to supplement responses may be imposed by order of the court, agreement of the parties, or at any time prior to trial through new requests for supplementation of prior responses.

(f) Electronically Stored Information.

(1) *Definition.*

"Inaccessible electronically stored information" means electronically stored information which is from sources where it cannot be retrieved without an unreasonable expense of time or money.

(2) *Electronically Stored Information Conferences.*

(A) *Conference as of right.* Upon the written request of any party made no later than 90 days after the service of the first responsive pleading by any defendant, the parties shall confer regarding electronically stored information. Such request shall be served on each party that has appeared, but it shall not be filed with the court. The conference shall be held as soon as practicable but no later than 30 days from the date of service of the request.

(B) *Conference by agreement of the parties.* At any time more than 90 days after the service of the first responsive pleading, any party may serve on each party that has appeared a request that all parties confer regarding electronically stored information. Such request shall not be filed with the court. If within 30 days after the request all parties do not agree to confer, any party may move that the court conduct a conference pursuant to Rule 16 regarding electronically stored information.

(C) *Purpose of electronically stored information conference among the parties.* The purpose of an electronically stored information conference is for the parties to develop a plan relating to the discovery of electronically stored information. Within 14 days after such conference the parties shall file with the court the plan and a statement concerning any issues upon which the parties cannot agree. At any electronically stored information conference the parties shall discuss:

(i) any issues relating to preservation of discoverable information;

(ii) the form in which each type of the information will be produced;

(iii) the time within which the information will be produced;

(iv) the method for asserting or preserving claims of privilege or of protection of trial preparation materials, including whether such claims may be asserted after production;

(v) the method for asserting or preserving confidential and proprietary status of information either of a party or a person not a party to the proceeding;

(vi) whether allocation among the parties of the expense of production is appropriate, and,

(vii) any other issue related to the discovery of electronically stored information.

(3) *Electronically Stored Information Orders.* The court may enter an order governing the discovery of electronically stored information pursuant to any plan referred to in subparagraph (2)(C), or following a Rule 16 conference, or upon motion of a party or stipulation of the parties, or *sua sponte*, after notice to the parties. Any such order may address:

(A) whether discovery of the information is reasonably likely to be sought in the proceeding;

(B) preservation of the information;

(C) the form in which each type of the information is to be produced;

(D) the time within which the information is to be produced;

(E) the permissible scope of discovery of the information;

(F) the method for asserting or preserving claims of privilege or of protection of the information as trial-preparation material after production;

(G) the method for asserting or preserving confidentiality and the proprietary status of information relating to a party or a person not a party to the proceeding;

(H) allocation of the expense of production; and

(I) any other issue relating to the discovery of the information.

(4) *Limitations on Electronically Stored Information Discovery.*

(A) A party may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible.

(B) On motion to compel or for a protective order relating to the discovery of electronically stored information, a party claiming inaccessibility bears the burden of showing inaccessibility.

(C) The court may order discovery of inaccessible electronically stored information if the party requesting discovery shows that the likely benefit of its receipt outweighs the likely burden of its production, taking into account the amount in controversy, the resources of the parties, the importance of the issues, and the importance of the requested discovery in resolving the issues.

(D) The court may set conditions for the discovery of inaccessible electronically stored information, including allocation of the expense of discovery.

(E) The court may limit the frequency or extent of electronically stored information discovery, even from an accessible source, in the interests of justice. Factors bearing on this decision include the following:

(i) whether it is possible to obtain the information from some other source that is more convenient or less burdensome or expensive;

(ii) whether the discovery sought is unreasonably cumulative or duplicative;

(iii) whether the party seeking discovery has had ample opportunity by discovery in the proceeding to obtain the information sought; or

(iv) whether the likely burden or expense of the proposed discovery outweighs the likely benefit.

RULE 34. PRODUCING DOCUMENTS, ELECTRONICALLY STORED INFORMATION, AND TANGIBLE THINGS, OR ENTERING ONTO LAND, FOR INSPECTION AND OTHER PURPOSES

(a) In General. A party may serve on any other party a request within the scope of Rule 26(b):

(1) to produce and permit the requesting party or its representative to inspect, copy, test, or sample the following items in the responding party's possession, custody, or control:

(A) any designated documents or electronically stored information -- including writings, drawings, graphs, charts, photographs, sound recordings, images and other data or data compilations - stored in any medium from which information can be obtained either directly or, if necessary, after translation by the responding party into a reasonably usable form; or

(B) any designated tangible things; or

(2) to permit entry onto designated land or other property possessed or controlled by the responding party, so that the requesting party may inspect, measure, survey, photograph, test, or sample the property or any designated object or operation on it.

(b) Procedure.

(1) *Contents of the Request.* The request may, without leave of court, be served upon the plaintiff after commencement of the action and upon any other party with or after service of the summons and complaint upon that party. The request shall set forth the items to be inspected either by individual item or by category, and describe each item and category with reasonable particularity. The request shall specify a reasonable time, place, and manner of making the inspection and performing the related acts, and it may specify the form in which electronically stored information is to be produced.

(2) *Responses and Objections.*

(A) *In General.* The party upon whom the request is served shall serve a written response within 30 days after the service of the request, except that a defendant may serve a response within 45 days after service of the summons and complaint upon that defendant. The court may allow a shorter or longer time. The response shall state, with respect to each item or category, that inspection and related activities will be permitted as requested, unless the request is objected to, in which event the reasons for objection shall be stated. If objection is made to part of an item or category, the part shall be specified. The party submitting the request may move for an order under Rule 37(a) with respect to any objection to or other failure to respond to the request or any part thereof, or any failure to permit inspection as requested.

(B) *Responding to a request for production of electronically stored information.* The response may state an objection to a requested form for producing electronically stored

information. If the responding party objects to a requested form -- or if no form was specified in the request -- the party shall state the form or forms it intends to use.

(C) *Producing the documents or electronically stored information.* Unless otherwise stipulated or ordered by the court, these procedures apply to producing documents or electronically stored information:

(i) A party shall produce documents as they are kept in the usual course of business or shall organize and label them to correspond to the categories in the request;

(ii) If a request does not specify a form for producing electronically stored information, a party shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms; and

(iii) A party need not produce the same electronically stored information in more than one form.

(c) Persons Not Parties. This rule does not preclude an independent action against a person not a party for production of documents and things and permission to enter upon land.

RULE 37. FAILURE TO MAKE DISCOVERY: SANCTIONS

(a) Motion for Order Compelling Discovery. Upon reasonable notice to other parties and all persons affected thereby, a party may apply for an order compelling discovery as follows:

(1) *Appropriate Court.* An application for an order to a party may be made to the court in which the action is pending, or on matters relating to a deposition, to the court in the county or judicial district, as the case may be, where the deposition is being taken. An application for an order to a deponent who is not a party shall be made to the court in the county or judicial district, as the case may be, where the deposition is being taken.

(2) *Motion.* If a deponent fails to answer a question propounded or submitted under Rules 30 or 31, or a corporation or other entity fails to make a designation under Rule 30(b)(6) or 31(a), or a party fails to answer an interrogatory submitted under Rule 33, or if a party, in response to a request for inspection submitted under Rule 34, fails to respond that inspection will be permitted as requested or fails to permit inspection as requested, the discovering party may move for an order compelling an answer or a designation or an order compelling inspection in accordance with the request. When taking a deposition on oral examination, the proponent of the question may complete or adjourn the examination before he applies for an order. If the court denies the motion in whole or in part, it may make such protective order as it would have been empowered to make on a motion made pursuant to Rule 26(c).

(3) *Evasive or Incomplete Answer.* For purposes of this subdivision an evasive or incomplete answer is to be treated as a failure to answer.

(4) *Award of Expenses of Motion.* If the motion is granted, the court may, after opportunity for hearing, require the party or deponent whose conduct necessitated the motion or the party or attorney advising such conduct or both of them to pay to the moving party the reasonable expenses incurred in obtaining the order, including attorney's fees, unless the court finds that the opposition to the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is denied, the court may, after opportunity for hearing, require the moving party or the attorney advising the motion or both of them to pay to the party or deponent who opposed the motion the reasonable expenses incurred in opposing the motion, including attorney's fees, unless the court finds that the making of the motion was substantially justified or that other circumstances make an award of expenses unjust.

If the motion is granted in part and denied in part, the court may apportion the reasonable expenses incurred in relation to the motion among the parties and persons in a just manner.

(b) Failure to Comply With Order.

(1) *Sanctions by Court in County or District Where Deposition is Taken.* If a deponent fails to be sworn or to answer a question after being directed to do so by the court in the county or judicial district, as the case may be, in which the deposition is being taken, the failure may be considered a contempt of that court.

(2) *Sanctions by Court in Which Action Is Pending.* If a party or an officer, director, or managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party fails to obey an order to provide or permit discovery, including an order made under subdivision (a) of this rule or Rule 35, the court in which the action is pending may make such orders in regard to the failure as are just, and among others the following:

(A) An order that the matters regarding which the order was made or any other designated facts shall be taken to be established for the purposes of the action in accordance with the claim of the party obtaining the order;

(B) An order refusing to allow the disobedient party to support or oppose designated claims or defenses, prohibiting him from introducing designated matters in evidence;

(C) An order striking out pleadings or parts thereof, or staying further proceedings until the order is obeyed, or dismissing the action or proceeding or any party thereof, or rendering a judgment by default against the disobedient party;

(D) In lieu of any of the foregoing orders or in addition thereto, an order treating as a contempt of court the failure to obey any orders except an order to submit to a physical or mental examination.

(E) Where a party has failed to comply with an order under Rule 35(a) requiring him to produce another for examination, such orders as are listed in paragraphs (A), (B), and (C) of this subdivision, unless the party failing to comply shows that he is unable to produce such person for examination.

In lieu of any of the foregoing orders or in addition thereto, the court may require the party failing to obey the order or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

(c) Expenses on Failure to Admit. If a party fails to admit the genuineness of any documents or the truth of any matters as requested under Rule 36, and if the party requesting the admissions thereafter proves the genuineness of the document or the truth of the matter, he may apply to the court for an order requiring the other party to pay him the reasonable expenses incurred in making that proof, including reasonable attorney's fees. The court shall make the order unless it finds that (1) the request was held objectionable pursuant to Rule 36(a), or (2) the admission sought was of no substantial importance, or (3) the party failing to admit had reasonable grounds to believe that he might prevail on the matter, or (4) there was other good reason for the failure to admit.

(d) Failure of Party to Attend at Own Deposition or Serve Answers to Interrogatories or Respond to Request for Inspection. If a party or an officer, director, or a managing agent of a party or a person designated under Rule 30(b)(6) or 31(a) to testify on behalf of a party wilfully fails (1) to appear before the officer who is to take his deposition, after being served with a proper notice, or (2) to serve answers or objections to interrogatories submitted under Rule 33, after proper service of the interrogatories, or (3) to serve a written response to a request for inspection submitted under Rule 34, after proper service of the request, the court in which the action is pending on motion may make such orders in regard to the failure

as are just, and among others it may take any action authorized under paragraphs (A), (B), and (C) of subdivision (b)(2) of this rule. In lieu of any order or in addition thereto, the court may require the party failing to act or the attorney advising him or both to pay the reasonable expenses, including attorney's fees, caused by the failure.

The failure to act described in this subdivision may not be excused on the ground that the discovery sought is objectionable unless the party failing to act has applied for a protective order as provided by Rule 26(c).

(e) Expenses Against Commonwealth. Except to the extent permitted by statute, expenses and fees may not be awarded against the Commonwealth under this rule.

(f) Failure to Provide Electronically Stored Information. Absent exceptional circumstances, a court may not impose sanctions on a party for failing to produce electronically stored information lost as a result of the routine, good-faith operation of an electronic information system.

RULE 45. SUBPOENA

(a) For Attendance of Witnesses; Form; Issuance. Every subpoena shall be issued by the clerk of court, by a notary public, or by a justice of the peace, shall state the name of the court and the title of the action, and shall command each person to whom it is directed to attend and give testimony at a time and place therein specified. The clerk, notary public, or justice of the peace shall issue a subpoena , or a subpoena for the production of documentary evidence, signed but otherwise in blank, to a party requesting it, who shall fill it in before service.

(b) For Production of Documentary Evidence. A subpoena may also command the person to whom it is directed to produce the books, papers, documents, electronically stored information, or tangible things designated therein; but the court upon motion made promptly and in any event at or before the time specified in the subpoena for compliance therewith, may (1) quash or modify the subpoena if it is unreasonable and oppressive or (2) condition denial of the motion upon the advancement by the person in whose behalf the subpoena is issued of the reasonable cost of producing the books, papers, documents, electronically stored information, or tangible things.

(c) Service. A subpoena may be served by any person who is not a party and is not less than 18 years of age. Service of a subpoena upon a person named therein shall be made by delivering a copy thereof to such person, or by exhibiting it and reading it to him, or by leaving a copy at his place of abode; and by tendering to him the fees for one day's attendance and the mileage allowed by law. When the subpoena is issued on behalf of the United States or the Commonwealth or a political subdivision thereof, or an officer, or agency of either, fees and mileage need not be tendered.

(d) Subpoena for Taking Deposition; Place of Examination.

(1) No subpoena for the taking of a deposition shall be issued prior to the service of a notice to take the deposition.

The subpoena may command the person to whom it is directed to produce and permit inspection and copying of designated books, papers, documents, electronically stored information, or tangible things which constitute or contain evidence relating to any of the matters within the scope of the examination permitted by these rules, but in that event the subpoena will be subject to the provisions of Rule 26(c) and subdivision (b) of this rule.

A deposition subpoena upon a party which commands the production of documents, electronically stored information, or things must give the party deponent at least thirty days for compliance after service thereof. Such subpoena shall not require compliance of a defendant within 45 days after service of the summons and complaint on that defendant. The court may allow a shorter or longer time.

The person to whom the subpoena is directed may within 10 days after the service thereof or on or before the time specified in the subpoena for compliance if such time is less than 10 days after service, serve upon the attorney designated in the subpoena written objection to inspection or copying of any or all of the designated materials. If objection is made, the party serving the subpoena shall not be entitled to inspect and copy the materials except pursuant to an

order of the court from which the subpoena was issued. The party serving the subpoena may if objection has been made, move upon notice to the deponent for an order at any time before or during the taking of the deposition.

(2) Unless the court orders otherwise, a resident of this Commonwealth shall not be required to attend an examination at a place more than 50 airline miles distant from either his residence, place of employment, or place of business, whichever is nearest to the place to which he is subpoenaed. A non-resident of the Commonwealth when served with a subpoena within the Commonwealth may be required to attend only in that county wherein he is served, or within 50 airline miles of the place of service, or at such other convenient place as is fixed by an order of court.

(e) Subpoena for a Hearing or Trial. At the request of any party subpoenas for attendance at a hearing or trial shall be issued by any of the persons directed in subdivision (a) of this rule. A subpoena requiring the attendance of a witness at a hearing or trial may be served at any place within the Commonwealth.

(f) Duties in Responding to a Subpoena.

(1) *Producing Documents or Electronically Stored Information.* These procedures apply to producing documents or electronically stored information:

(A) *Documents.* A person responding to a subpoena that requires production of documents shall produce them as they are kept in the ordinary course of business or shall organize and label them to correspond to the categories in the demand.

(B) *Form for producing* electronically *stored information not specified.* If a subpoena does not specify a form for producing electronically stored information, the person responding shall produce it in a form or forms in which it is ordinarily maintained or in a reasonably usable form or forms.

(C) *Electronically stored information produced in only one form.* The person responding need not produce the same electronically stored information in more than one form.

(D) *Inaccessible electronically stored information.* The person responding may object to the discovery of inaccessible electronically stored information, and any such objection shall specify the reason that such discovery is inaccessible. On motion to compel or for a protective order, the person claiming inaccessibility bears the burden of showing inaccessibility. If that showing is made, the court may nonetheless order discovery from such sources if the requesting party shows good cause, considering the limitations of Rule 26(f)(4)(C) and (D). The court may specify conditions for the discovery.

(2) *Claiming Privilege or Protection.*

(A) *Information withheld.* A person withholding subpoenaed information under a claim that it is privileged or subject to protection as trial-preparation material shall make the

claim expressly and provide information that will enable the parties to assess the claim. A privilege log need not be prepared.

(B) *Information mistakenly produced.* If information produced in response to a subpoena is subject to a claim of privilege or of protection as trial-preparation material, the person making the claim may notify any party that received the information of the claim and the basis for it. The provisions of Rule 26(b)(5)(B) and (C) are applicable.

(3) *Further Protection.* Any person subject to a subpoena under this rule may move the court:

(A) for a protective order under rule 26(c) or

(B) to be deemed entitled to any protection set forth in any discovery or procedural order previously entered in the case.

(g) Contempt. Failure by any person without adequate excuse to obey a subpoena served upon him may be deemed a contempt of the court in which the action is pending.